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VIA ECF

Hon. Gregory H. Woods
U.S. District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *Christopher Hudson v. National Football League Management Council, et al.*, 18-cv-4483-GHW-RWL – Request for Pre-Motion Conference

Your Honor:

We write on behalf of Defendant National Football League Players Association, the union representing professional NFL football players. The Players Association requests a pre-motion conference for its anticipated motion to dismiss Plaintiff Christopher Hudson's amended class action complaint (ECF 104). In September 2019, the Court adopted Magistrate Judge Lehrburger's R&R recommending dismissal of all claims against the Players Association, but granted Hudson leave to amend one count alleging that the Players Association failed to monitor its appointees to the Retirement Board (ECF 96). Hudson has failed to remedy "the deficiencies in [Hudson's] complaint" identified by the Court (ECF 96 at 7). He has failed to plead facts that if true would establish a breach of a duty to monitor. More fundamentally, however, Hudson's allegations concern matters beyond "the scope of the duty to monitor … in the multiemployer plan context," as Judge Lehrburger "persuasive[ly] reason[ed]" (ECF 96 at 6–7). Hudson's claim against the Players Association should be dismissed, this time with prejudice.

This is an Employee Retirement Income Security Act ("ERISA") case. Hudson alleges breaches of fiduciary duty arising from the alleged failure to disclose the standard for obtaining reclassification of disability benefits. Hudson is a participant in an ERISA benefits plan providing disability benefits to former professional football players. Hudson petitioned for and began receiving disability benefits. He later learned more information about his disability and petitioned for reclassification to a more generous level of benefits. The board administering the plan denied that petition for failure to show changed circumstances, a showing required by the plan to justify reclassification. Hudson sued the board and its members, alleging that he was never told the standard for showing changed circumstances. Hudson also sued the NFL Management Council and the Players Association, which collectively bargained the benefits plan and appointed the members of the board, alleging that they failed to properly monitor their appointees to the board.

In dismissing Hudson's first attempt to plead a failure-to-monitor claim, the Court identified key pleading deficiencies. Hudson's complaint "sa[id] absolutely nothing about the actions of

… the Association with regards to [its] duty to monitor the members of Retirement Board" (ECF 96 at 7). Hudson "d[id] not take issue with the actual procedures … the Association used to monitor the board and he d[id] not allege that … the Association was aware of any red flags that should have alerted [it] to potential breaches of fiduciary duties by members of the Retirement Board" (*id.*). Thus, "[e]ven assuming that the scope of the duty to monitor as described in the[] single employer plan cases [cited by Hudson] is the same in the multi-employer plan context—a premise that the Court d[id] not necessarily accept in light of the Supreme Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981) and Judge Lehrburger's persuasive reasoning on this point," Hudson had failed to state a claim (ECF 96 at 7).

Hudson's Amended Complaint fails to remedy "the deficiencies in his [original] complaint" (*id.*). Hudson still has "not take[n] issue with the actual procedures … used to monitor the board" (*id.*). None of five paragraphs Hudson added about the Management Council and Players Association concern actual monitoring procedures (ECF 104 at ¶¶ 48–52).

Nor has Hudson alleged that the Players Association "was aware of any red flags" that should have alerted it to potential breaches by the Board (ECF 96 at 7). None of Hudson's new allegations are relevant to the Board's alleged failure to disclose the standard for reclassification. Hudson alleges that the "rate at which retired players file suits regarding the denial of their benefits" should have been a red flag, but this alleged "potentially deficient process of benefit awards" does not concern reclassification (ECF 104 at ¶ 49). Hudson cites a *Vice* news article, a *New York Times* news article, and statements by scholars at the Petrie-Flom Center, none of which mention reclassification (*id.* at ¶¶ 51–52). Hudson alleges that "[t]he existence" of three lawsuits against the Board "relating to [the] interpretation of the term 'changed circumstances'" was a red flag, but these lawsuits concerned the Board's application of the standard and not its purported failure to disclose (*id.* at ¶ 50). The closest Hudson comes to a relevant allegation is his claim that at an unspecified time, the Players Association received a single call from a Plan participant who "expressed his confusion" about the standard for reclassification (*id.* at ¶¶ 47–48). This single call is not a red flag. Even so, Hudson never alleges that the caller complained of any "affirmative misrepresentat[ion]" or knowing "fail[ure] to provide information" by the Players Association's appointees (ECF 96 at 5 (quoting *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001)).

More fundamentally, however, Hudson's claim fails because his allegations concern matters beyond "the scope of the duty to monitor … in the multiemployer plan context," as Judge Lehrburger "persuasive[ly] reason[ed]" (ECF 96 at 6–7). As before, Hudson contends that the Players Association should have required its appointees to make certain substantive decisions (ECF 104 at ¶ 78). But "the mere ability to appoint or remove trustees to the board of a retirement plan is insufficient to establish broader fiduciary liability for the trustees' substantive decisions" (ECF 90 at 35). ERISA does not impose an "independent obligation to review the decisions of the trustees for every single purported error and take steps to correct those errors, by *inter alia*, removing trustees with whom they disagree" (*id.*) That standard "would make any supervisor of an ERISA fiduciary also an ERISA fiduciary" (*id.* at 35–36 (quoting *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 760 (S.D.N.Y. 2003)). And it "would defeat the purpose of having trustees appointed to run a benefits plan in the first place" (*id.* at 36 (quoting *Johnson v. Evangelical Lutheran Church in Am.*, 2011 WL 2970962, at *5 (D. Minn. July 22, 2011)).

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"In multi-employer plans, such as the one here, the [Labor Management Relations Act] prohibits an appointing party from directing or supervising the decisions of the independent board members" (ECF 90 at 35 (citing *Amax Coal*, 453 U.S. at 329–30)). In sum, the premise of Hudson's theory of liability "would be unworkable from a practical perspective, and would undermine the [Labor Management Relations Act's] bar against appointing entities from supervising or directing the trustees they appoint" (*id.*) (citing *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 760 (S.D.N.Y. 2003); *Johnson v. Evangelical Lutheran Church in Am.*, 2011 WL 2970962, at *5 (D. Minn. July 22, 2011); *Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 881-82 (N.D. Ill. 2009)).

Finally, if the Court dismisses Hudson's underlying claims against the Board Defendants, Hudson's claim against the Players Association should be dismissed too. "A claim for breach of the duty to monitor requires an antecedent breach to be viable." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 580 (S.D.N.Y. 2011). Should the Board Defendants seek to dismiss Hudson's claims, then the Players Association would seek dismissal on that basis too.

Respectfully submitted,

/s/ William G. Miossi

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cc. Counsel of Record (by ECF)